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CITATIONS

771899—48——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 458

BENJAMIN F. FIELDS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 404–408) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered October 27, 1947 (R. 409). The petition for a writ of certiorari was filed November 26, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a bill of particulars.

2. Whether there was a fatal variance between the charges of the indictment and the proof.

3. Whether the evidence was sufficient to support the verdict.

4. Whether the court erred in excluding evidence which petitioner offered to show that the Committee's acts were prompted by political motives.

5. Whether the court erred in allowing the Government to cross-examine one of its own witnesses.

6. Whether "willfully" as used in R. S. 102 means "done with an evil or bad purpose" rather than "deliberate and intentional."

STATUTE INVOLVED

R. S. 102, as amended (2 U. S. C. 192) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more

than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

STATEMENT

Petitioner was indicted in the District Court of the United States for the District of Columbia in two counts, each charging a violation of Section 102 of the Revised Statutes, as amended. The first count alleged that the House of Representatives of the United States created a Select Committee to investigate the disposition of surplus property acquired by the Government of the United States in connection with the war effort; that petitioner, appearing before the Committee as a witness, "was questioned regarding a contract between the United States and Warr Built Homes, Inc., or C. B. Warr, or Warr Caston Lumber Company, dated about June 19, 1946, for the sale of five hundred and thirty-nine rolls of bronze mesh screen wire"; that in the course of his testimony, petitioner produced a paper which read as follows:

BRONZE WIRE SCREENING

Gross profit		$4,442.80
Less:		
Brokerage, ⅓ to Glenn A. Dies	$1,480.93	
Brokerage, ⅓ to John Doe	1,480.93	
Brokerage to John Doe	400.00	
Traveling and misc. expenses	100.00	
	3,461.86	3,461.86
Net profit		980.94

If they question profits we make, which amount to 5 per cent, remind them of the fact that they pay their own brokers and agents 12½ per cent.

that petitioner thereafter was summoned to produce "certain papers, that is to say, all books, records, documents, memoranda, notes, ledger sheets, cancelled checks, and other evidence of payments and other material relating to or connected with the contracts;" and that on August 14, 1946, petitioner appeared before the Committee but failed and refused to produce all such papers as were available to him and could have been produced by him and thereby willfully defaulted. The second count incorporated by reference the allegations of the first, and charged a second default on August 15, 1946. (R. 1–4.)

Prior to trial, petitioner filed an affidavit to the effect that he knew of no such "contract" as that alleged in the indictment (R. 8–9), and he moved that the United States be ordered to furnish him with a certified copy of such contract (R. 9–10). He also filed a motion for a bill of particulars requesting that he be furnished the originals or copies of all documents that he had failed and refused to produce (R. 11–12). Both motions were denied (R. 10, 12).

The evidence for the Government may be summarized as follows:

Representative Slaughter, Chairman of the Surplus Property Committee, testified that petitioner appeared before the Committee on August

12, 1946. Petitioner told the Committee that he acted as a broker for clients who bought and sold surplus property, and he was questioned with regard to 539 rolls of surplus bronze screening which had been sold to C. B. Warr. (R. 30–34.) Petitioner admitted that he had received a commission of more than 50%, and when asked with whom he had split it, he stated that Dies, Payne, and another whom he could not remember had participated (R. 50–51). When asked for his file on the transaction, petitioner produced it and the Committee found therein a paper (*supra,* p. 3) which showed that two "John Does" had shared in the commission (R. 53, 162–166). When petitioner could not satisfactorily explain the identity of the "John Does," the Committee became suspicious that they might refer to some one in the War Assets Administration (R. 177–178, 221–225). Consequently, on the following day, August 13, 1946, a subpoena was issued ordering petitioner to produce all papers and records relative to the Warr transaction (R. 178, 396). On the two succeeding days, August 14 and 15, 1946, petitioner again appeared but did not satisfy the Committee that he had produced all his records, although he stated that he had produced all he had (R. 178–189).

The Government also introduced evidence to show that on August 14 and 15, 1946, certain pertinent records were available to petitioner.

(1) There was testimony that petitioner received a check for $4,442.80 for his fee in the Warr transaction (R. 90–93, 230–232) and that this was deposited in the Industrial Bank of Washington on June 20, 1946, together with $600 in cash (R. 350–351, 395). The duplicate deposit slip showing this deposit was in petitioner's office a few days later on June 25 or 26, 1946, (R. 111–113, 121–122); it seems to have remained there throughout the period of his appearances before the Committee during August and until a few days before petitioner's trial, when his secretary readily produced it from the white envelope in which she kept her deposit slips (R. 124, 136–137). (2) The Industrial Bank furnished to petitioner's office a monthly statement for the month of June 1946, which showed the deposit of June 20; an official of the bank testified that such statements were normally sent to customers within the first ten days of the succeeding month and that the bank's books did not indicate any departure from the normal course of business for June 1946; and the June 1946 statement was produced at the trial by petitioner's secretary (R. 30, 92–97, 121, 400–401). (3) When Dies left petitioner's organization on June 29, 1946, a check was written covering his share of the Warr deal. Petitioner immediately cashed the check for Dies and later instructed his secretary to write "cancelled" across the stub in the check

book. (R. 125–127, 148–154.) Petitioner's secretary produced the check book containing the stub at the trial in response to a subpoena (R. 30, 110, 125, 402). Chairman Slaughter testified that petitioner did not produce the deposit slip, the bank statement or the check stub in response to the Committee's subpoena (R. 197–199).

The evidence further reveals that petitioner told the Committee conflicting stories about the records demanded by it. When first asked for the records of the Warr transaction, he told the Committee that his auditor had them; later he said that the auditor was behind in posting his books, and that the auditor had none of the desired records and would be unable to get the books up to date until petitioner gave him memoranda of the various transactions to be entered (R. 179–189). Petitioner first told the Committee that Payne had received his split by withholding $400 before he turned over the check for $4,442.80 to petitioner (R. 50–51); then he "remembered" that Payne was the "John Doe" who got $400 out of the $4,442.80 (R. 169–170); finally he testified that this "John Doe" was Harry Lyons (R. 344–348). On August 12, 1946, he told the Committee that he could not remember the name of the "John Doe" who received $1,480,93 out of the amount received on June 20, 1946 (R. 169); but two days later he stated that this "John Doe" was Brunner (R. 179), who had been working in peti-

tioner's office until a few days before the date of petitioner's testimony and who was a partner in the surplus property deals (R. 243–250).

At the close of the evidence, petitioner requested that the jury be instructed that the term "willfully," as used in the statute, meant "done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely" (R. 14–15). The court refused this request, and instead instructed the jury that the term meant "deliberate and intentional" as opposed to mere inadvertence or accident, but that it did not necessarily connote "an evil or a bad purpose" (R. 368).

The court directed a verdict of acquittal on the first count (Tr. 1456), but petitioner was convicted on the second count and was sentenced to imprisonment for 90 days and to pay a fine of $250 (R. 16, 379).

ARGUMENT

1. Petitioner contends that he was deprived of due process of law in that his request for a bill of particulars was denied (Pet. 2, 6, 10, 14, 15, 16–17). Such a request is addressed to the discretion of the trial court. Rule 7 (f), F. R. Crim. P. We think it clear that there was no abuse of discretion here. The Government need not furnish particulars when the one seeking them is in possession of the means of ascertaining them. *United States* v. *Skidmore*, 123 F. 2d 604, 607 (C. C. A. 7). Petitioner himself introduced the deposit slip in evidence (R. 131) and the bank state-

ment and check stub were produced by his secretary at the outset of the trial (R. 29–30). There is nothing in the record indicating that petitioner was taken by surprise during the progress of the trial, or that his substantial rights were prejudiced in any way by the denial of the bill of particulars. *Wong Tai* v. *United States,* 273 U. S. 77, 82. Moreover, this point was not raised in the Court of Appeals, and is thus in the nature of an afterthought here.

2. Petitioner insists that there was a material variance, in that the indictment charged that he was ordered to produce all papers relative to a "contract" between the United States and C. B. Warr, whereas the proof failed to show any such contract (Pet. 2, 5–6, 14, 17–18).[1] But the essence of the charge was that petitioner had failed to produce records relative to a matter under inquiry by the Committee, i. e., a certain specific transaction in surplus property, which was proved by the evidence. The description of this transaction as a "contract" could only be fatal if it had misled petitioner, or if he would not be protected

[1] The evidence was that petitioner originally ordered the wire for Baumrin, but by the time the allocation came through Baumrin no longer wanted it and Warr agreed to take it (R. 140–141); that the sale contract was made out to petitioner (R. 55, 385), but that petitioner paid for the wire with Warr's money and had it shipped direct to Warr from the Goverment depot (R. 141–142). In view of petitioner's own statement that he was a broker in surplus property (R. 33), Warr would appear to have been the undisclosed principal in this contract.

from a further prosecution for the same offense. "The true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States,* 295 U. S. 78, 82. Petitioner makes no showing of surprise, and the offense is so particularized that further prosecution would be impossible.

3. We think it clear from the Statement (*supra,* pp. 3–8) that there is no merit in the contention that the verdict is not supported by the evidence (Pet. 2, 3–10, 14, 15). There was evidence that certain records were demanded, and that records meeting the description were available to petitioner at the time. There was also evidence from which the jury might properly have inferred that petitioner was endeavoring to conceal from the Committee the true circumstances surrounding the Warr transaction.

4. Petitioner attempted to challenge the legality of the Committee's acts by offering evidence that its members were guided by personal or political, rather than legislative, motives (R. 204–213), and he contends that the trial court erred in excluding this evidence (Pet. 3, 10, 14, 15–16). However, it is settled that the courts will not scrutinize the motives of a legislative body when it exercises a power properly conferred on it. *Arizona* v. *California,* 283 U. S. 423, 455–457; *Sonzinsky* v. *United States,* 300

U. S. 506, 513–514. Of course, as petitioner points out (Pet. 16), Congress has no general power of inquiry into private affairs. But here the purpose for which the Committee was established was clearly legislative, since it was instructed to investigate the adequacy or inadequacy of the statutes controlling disposal of surplus property (R. 2); and the demand for the records of the Warr deal was clearly in aid of this legislative function. Consequently, the court properly excluded evidence offered solely to show political or personal motives.

5. Petitioner complains that the court erred in permitting the Government to cross-examine its own witness, Brunner (Pet. 2, 10, 14, 28–34). Brunner is a business associate of petitioner (R. 243). The Government hoped to show through his testimony a possible motive for petitioner's default, in that petitioner desired to conceal the fact that Brunner, who was on parole on a Federal sentence, had violated the terms of his parole by engaging in a surplus property transaction (R. 241, 243, 258). Before Brunner was called to the stand, the prosecutor informed the court that he was a witness hostile to the Government, and asked that he be called as the court's witness and that permission be granted to cross-examine him from the outset (R. 238–243). Such permission was granted (R. 238). The prosecutor began by asking Brunner whether he was on parole when he went to work for petitioner (R. 243).

This could not be classed as an impeaching question, since the answer had an immediate bearing upon the point at issue in the case. Later, however, after Brunner had testified that his efforts had made the Warr transaction possible, he was confronted with his statement to the Committee that he had not participated in it. He admitted that he had made this statement and explained that it was because he was under supervision of the Parole Board at the time (R. 254–258).

It is true that it is frequently laid down as a general rule in the federal courts that a party may cross-examine his own witness only after being surprised by his testimony. *Hickory* v. *United States,* 151 U. S. 303, 309; *United States* v. *Maggio,* 126 F. 2d 155, 158–159 (C. C. A. 3), certiorari denied, 316 U. S. 686; *United States* v. *Graham,* 102 F. 2d 436, 441–442 (C. C. A. 2), certiorari denied, 307 U. S. 643; 3 Wigmore, *Evidence* (3d ed. 1940) § 905, note 4. In this case, permission was granted to cross-examine without any showing of surprise. However, for a number of reasons we believe that the rule, if it be one, was not violated; and that, in any event no substantial harm was done to petitioner.

(a) A hostile witness may be called by the court itself and subjected to cross-examination by both parties. *Litsinger* v. *United States,* 44 F. 2d 45 (C. C. A. 7); *Hirschfeld* v. *United States,* 54 F. 2d 62 (C. C. A. 7); *Fournier* v. *United States,* 58 F. 2d 3 (C. C. A. 7); 3 Wigmore, *Evi-*

dence (3d ed. 1940) § 918. The court was asked to follow this procedure here, and it is not entirely clear that it did not do so (R. 238–243). Furthermore, if on a new trial the court specifically made Brunner its own witness, there could be no objection if the Government asked him the same questions as were asked here.

(b) It also appears, as the trial judge himself pointed out (R. 241–242), that the Government did not actually cross-examine since the object of the questions was not to discredit Brunner's testimony in court, but to show affirmatively that in testifying before the Committee he and petitioner had attempted to conceal Brunner's real part in the Warr deal.

(c) The Government, despite the court's permission, did not begin its cross-examination until Brunner had told a story which conflicted with his testimony before the Committee.

(d) Finally, since petitioner himself testified that he told the Committee that Brunner had very little to do with the Warr deal because he did not want to put Brunner on the "spot" with the Parole Board (R. 339–343), it is difficult to see wherein he was prejudiced by the trial court's action.

Petitioner relies upon *Young* v. *United States,* 97 F. 2d 200, 205–206 (C. C. A. 5), in which a conviction was reversed because the Government was permitted to cross-examine a witness, though it knew in advance that he would be hostile.

However, at the second trial of the case, the witness was called by the court itself and the Government was permitted to cross-examine in the same fashion as before. The conviction was then upheld. *United States v. Young,* 26 F. Supp. 574 (W. D. Tex.), affirmed, *Young* v. *United States,* 107 F. 2d 490, 492–494 (C. C. A. 5). Petitioner relies further upon *United States* v. *Biener,* 52 F. Supp. 54 (E. D. Pa.). In that case the court was very critical of the rule it felt called upon to apply, and it does not seem to have been suggested that the difficulty could be avoided by having the court call the witness.

6. Finally, petitioner complains that the court erred in instructing the jury that "willful" as used in the statute means a deliberate and intentional default, but not necessarily one committed with an evil or bad purpose (Pet. 3, 15, 18–25). He argues that under a proper instruction the jury might have found that he acted in good faith and might have acquitted him (Pet. 21). However, petitioner offered no evidence that he acted intentionally but in good faith. His whole defense was that his default was unintentional, i. e., that he either did not have the papers in his possession or that he had overlooked them (see, e. g., R. 327). And the trial court instructed the jury that if they believed this explanation they should acquit him (R. 368–372). Petitioner introduced no evidence to show that he deliber-

ately withheld the documents because he believed such action justified, and he was not entitled to an instruction on an issue which was not in the case. And, finally, even if petitioner's offered instruction were correct, which we do not concede,[2] he would not have been entitled to acquittal on the evidence before the jury.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1948.

[2] We agree with the Court of Appeals' holding that "willful" is a word of many meanings and its construction must be derived from its context (*Screws* v. *United States*, 325 U. S. 91, 101; *Spies* v. *United States*, 317 U. S. 492, 497; *United States* v. *Murdock*, 290 U. S. 389, 394) and that the purpose of congressional investigating committees would be frustrated if a witness could gain virtual immunity from prosecution by setting up his own "good faith" judgment against that of the committee on a question of the committee's power. Cf. *Townsend* v. *United States*, 95 F. 2d 352, 361 (App. D. C.), certiorari denied, 303 U. S. 664.

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